92-676

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

FRED T. WILBURN,
Petitioner,

vs.

CONSOLIDATED RAIL CORPORATION,
Respondent,

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In an action for personal injuries by a railroad employee against his railroad employer under the Federal Employer's Liability Act was the trial court correct in holding as a matter of law there was no jury issue as to the employer's negligence where there was undisputed evidence the employer knew of the presence of a large dog which eventually attacked the employee and yet negligently assigned the employee to work alone in an unguarded and unprotected position exposing him to an attack by the dog resulting in his injuries?

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OPINIONS BELOW

Petitioner, Fred T. Wilburn, respectfully prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Third Circuit to review the judgment of that Court rendered on August 11, 1992, in Case No. 92-5028 (Appendix A). Said judgment affirmed the memorandum and order of the United States District Court for the District of New Jersey rendered April 6, 1989. Said memorandum and order sustained a motion for summary judgment filed by the respondent, Consolidated Rail Corporation.

JURISDICTION OF THE COURT

On August 11, 1992 the United States Court of Appeals for the Third Circuit entered judgment in favor of the respondent. Count One of the petitioner's complaint (R. 6) dismissed by the trial court on respondent's motion for summary judgment sets forth claims arising under the Federal Employers' Liability Act, Title 45, U.S.C., Sections 51 and following.

Jurisdiction to review the said judgment, by writ of certiorari is accordingly conferred upon this Court by Title 28, U.S.C., Section 1254 which provides in portions pertinent to this review as follows:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

* * * * *

STATUTES INVOLVED

The statutes involved in this petition for review are certain sections of the Federal Employers' Liability Act, Title 45, U.S.C., Sections 51 and following.

Section 51 of the Federal Employers' Liability Act, Title 45, U.S.C., provides in pertinent part:

> "Every common carrier by railroad while engaging in commerce between any of the States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track roadbed, works, boats, wharves, or other equipment."

STATEMENT OF THE CASE

This is an action originally brought by petitioner, Fred T. Wilburn, against the respondent, Consolidated Rail Corporation, as well as Melvin and Karen Washington for injuries suffered by petitioner while working as a railroad welder's helper performing track department work on the respondent's main tracks in Woodbury, New Jersey. Hereinafter, Fred T. Wilburn, will be referred to as "petitioner" and Consolidated Rail Corporation, will be referred to as "respondent".

During the afternoon of September 5, 1985, a large black labrador dog owned by the Washingtons wandered into the area where a welder also employed by the respondent and the petitioner were preparing to perform their work. The petitioner's supervisor, and his assistant, were aware of the presence of the dog and in fact, had petted the dog. (R.35-36).

Towards the end of the work day, while the welder was involved in welding some railroad track, the petitioner's supervisor, assigned the petitioner to leave

the welder and go to a nearby, but different location along the track in order to use a cutting torch to cut a piece of rail which was sitting too close to the track. (R.37).

The petitioner proceeded to this new location. While working unattended in a bent over position with his goggles down, cutting the rail with his cutting torch, the petitioner was attacked by the same black labrador dog observed earlier in the day on the respondent's property. (R.37-38, 44).

When the dog saw the petitioner working with the welding torch it began to bark, attacked the petitioner, and snapped at his leg, thereby causing the petitioner while fending off the attack to fall backwards onto a rail injuring his back. (R.37-38, 44-45). The welder who was also at the time of the attack now working unattended some distance from the petitioner was able to stop the attacking dog by throwing sticks and rocks at the animal. (R.45).

Complaint was filed on March 31, 1987, in the United States District Court for the District of New Jersey at Camden, New Jersey. (R.6). In petitioner's complaint he alleges that while employed by the respondent railroad on September 5, 1985, he was injured as a result of the respondent's negligence in failing to furnish a reasonably safe place to work, a safe and suitable means or method of performing his job, insufficient help to perform his job, a failure to adequately warn him of the impending danger of his position and failing to provide safe and suitable equipment with which to work. Said claims were alleged pursuant to the Federal Employer's Liability Act (hereinafter referred to as FELA).

On May 8, 1987, respondent's answer to petitioner's Complaint was filed. (R.11). In the answer the respondent admitted the jurisdictional allegations of the petitioner's complaint and admitted that petitioner was employed by the respondent on September 5, 1985. In addition to denying its negligence through various

affirmative defenses, the respondent raised the defense of contributory negligence.

In a second count in his complaint, the petitioner separately alleged that the dog's owners were negligent and in violation of New Jersey law in failing to take reasonable and necessary precautions to control their dog which attacked the petitioner while he was working for the respondent on September 5, 1985.

Respondent's motion for summary judgment was filed against the petitioner on November 14, 1988, pursuant to Rule 56(c), Federal Rules of Civil Procedure and was sustained by the trial court on April 6, 1989 by memorandum and order. (R.18). Petitioner's motion for reconsideration was denied by memorandum and order dated May 5, 1989. (R.23). Petitioner's action against the owners of the dog continued until December 16, 1991 when it was concluded by a Stipulation and Order of Dismissal, reserving all rights against the respondent and creating a final appealable order. (R.25). On January 9, 1992, a Notice of Appeal was filed with the trial court

appealing from the order entered in the action on April 6, 1989 granting summary judgment to the respondent as against the petitioner. (R.27). On August 11, 1992 the United States Court of Appeals for the Third Circuit entered a judgment affirming the granting of the respondent's motion for summary judgment.

REASONS FOR GRANTING PETITION

This case presents important questions concerning the consistent application of the appropriate judicial test for when a jury should be permitted to determine the negligence, or lack thereof, of a railroad employer under the FELA.

The decision rendered by the United States District Court for the District of New Jersey and affirmed by the United States Court of Appeals for the Third Circuit is in direct conflict with the opinion of the United States Court of Appeals for the Second Circuit in the substantially similar case of *Gallose v. Long Island Railroad Co.*, 878 F.2d 80 (2nd Cir. 1989).

The FELA is liberally construed to effectuate its purpose of benefiting and protecting railroad employees. *Sowards v. Chesapeake and Ohio Ry. Co.*, 580 F.2d 713 (4th Cir. 1978). The liberal purpose of the FELA must be kept in mind when confronting arguments which could restrict an employer's liability under this chapter. *Baker*

v. Baltimore & Ohio R. Co., 502 F.2d 638 (6th Cir. 1974). In accordance with this liberal construction, the standard for determining liability of a railroad under the FELA is whether any negligence of the respondent railroad played any part, "even in the slightest," in causing or contributing to cause injury to a petitioner employee. *Rogers v. Missouri-Pacific Railroad Co.*, 352 U.S. 500 (1957).

Under the FELA, issues must be submitted to the jury if there is evidence of "any probative value" showing some negligence of the railroad caused in any part the injuries for which damages are sought, "even if such a conclusion must necessarily be based upon speculation and conjecture." *Lavender v. Kurn*, 327 U.S. 645 (1946). The issue of the employer's negligence may be withdrawn from the jury only if there is a zero probability that the employer's negligence caused or contributed to cause the employee's injury. *Penhowic v. Erie Lackawanna Railroad Co.*, 430 F.2d 697 (3rd Cir. 1970).

In *Gallose, supra,* a jury was permitted to determine whether or not the mere knowledge of the presence of a large dog on the railroad employer's property required the employer to act to protect its employee from potential danger. In this case, the petitioner was denied jury determination under similar circumstances because the trial court, contrary to the liberal spirit and intent of the FELA, required proof of the railroad employer's knowledge of the vicious propensity of the dog.

In deciding *Gallose*, the United States Court of Appeals for the Second Circuit determined on June 26, 1989, shortly after the decision in this case, that when a railroad employee was injured when bitten by a dog brought to work by a fellow employee, there was an issue of whether or not the railroad had breached its duty to provide the bitten employee with a safe work place if the railroad had knowledge that the dog was on its premises and failed to take appropriate steps to inform or protect its employees. In so stating the Second Circuit

pointed out that the issue is not whether or not the railroad had knowledge of the vicious propensity of the dog. *Gallose, supra* at p.85.

Contrary to the Second Circuit in *Gallose*, the trial court in this case required petitioner to present evidence of the dangerous propensities of the dog which attacked him. The trial court herein stated as follows at p. 4 of its Memorandum and Order:

> "Plaintiff presents no evidence which would support an inference that Conrail was aware of the dangerous nature of the dog. On the contrary, deposition testimony indicates that the dog was even-tempered, playful, and had never before attacked anyone. Absent evidence of Conrail's awareness of the dog's dangerous nature, plaintiff cannot sustain his burden of proof on this issue."

(Appendix B).

In its opinion in *Gallose*, at page 85, the Second Circuit reasoned that while a railroad is not liable if it has no reasonable way of knowing that a potential hazard exists, it must take reasonable steps to investigate and inform and protect its employees when it learns or should

learn of a potential hazard, or it will be liable when injury occurs. Citing, *Mohn v. Marla Marie, Inc.*, 625 F.2d 900 (9th Cir. 1980). The court then applied law to facts and stated the following:

> "Here, we cannot say, as a matter of law, that a large dog, brought to the work place by an employee for protection, does not constitute a potential hazard in the work place unless it possesses vicious propensities. To the contrary, we think that a jury reasonably could have found that the mere presence of this german shepherd-mix dog, which weighed over 70 pounds and reached almost 5 feet tall when it stood on its hind legs, created a potential hazard at Gallose's place of employment. Accordingly, the issue before the jury should have been, not whether the LIRR knew that the dog had vicious propensities, but whether the LIRR knew or should have known that a large German Shepherd-mix dog was on the premises, and if so, whether an employer using reasonable care should have investigated further or taken other steps to inform and protect its employees.

Id. at 85. (Emphasis added)

Likewise, in this case the appropriate issue for the trial court was not whether the dog Magnum was known to the railroad as a vicious dog and therefore a potential

hazard to the petitioner, but whether or not the respondent, through its supervisors, with knowledge of the presence of a dog at a work place where its workers would be performing tasks which required their concentration while wearing goggles should have separated the petitioner and his co-worker and left them to work unattended, or should have continued its practice of providing a helper who in turn would have been in a position to not only protect the worker from approaching trains, but also protect from the potential hazard of a dog interfering and creating a hazard while the work was underway.

In *Gallose*, the issue of the railroad's negligence was left for the jury. In this case the same issue was taken away from the jury and decided by the trial court. If this totally irreconcilable decision by the United States District Court for the District of New Jersey is permitted to stand, the door will be open to serious erosion of federal statutory rights granted employees by the FELA. This will result in a serious denial of rights granted by

federal statutes which should be reviewed by this Court to ensure consistent results throughout the various federal and state jurisdictions where the issue arises as to what constitutes a jury issue under the FELA.

CONCLUSION

The effect of the trial court's decision to grant respondent summary judgment and the affirmation of that decision on appeal was to preclude lawful consideration by a jury of the negligence or lack thereof by a railroad employer under the FELA. This Court should grant certiorari, review the record, reverse the lower court and remand this case for a full trial on the merits.

Respectfully submitted,

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APPENDIX A

Judgment of the United States Court
of Appeals for the Third Circuit

(Rendered August 11, 1992)

No. 92-5028

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FRED T. WILBURN
Appellant,

vs.

CONSOLIDATED RAIL CORPORATION;
MELVIN WASHINGTON; KAREN WASHINGTON
Appellee.

On Appeal from the United States District
Court For The District of New Jersey
District Judge: Hon. John C. Lifland

Submitted Under Third Circuit Rule 12(6)
July 30, 1992

Before: Becker, Mansmann and Nygaard,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED, and ORDERED that the judgment of the district court be and is hereby AFFIRMED.

Costs taxed against appellant.

/s/ R. Nygaard
Circuit Judge

APPENDIX B

Memorandum and Order of the United States District Court for the District of New Jersey

(Decided April 6, 1989)

Civil Action No. 87-1138

IN THE UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

FRED T. WILBURN
Plaintiff,

vs.

CONSOLIDATED RAIL CORP., MELVIN WASHINGTON AND KAREN WASHINGTON
Defendants.

Presently before the court is a motion by defendant Consolidated Rail Corporation (Conrail) for summary judgment pursuant to Fed.R.Civ.P. 56(c). Having reviewed the moving papers and heard oral argument, this court grants Conrail's motion for summary judgment.

FACTS

On September 5, 1985, plaintiff was employed by Conrail as a trackman and welder's helper. At approximately 8:00 p.m. plaintiff was engaged in cutting a piece of rail with an acetylene torch. The record indicates that plaintiff was aware of the presence of a dog who frequently roamed the area. The dog's owners, Karen and Melvin Washington (also defendants) testify that other trackmen routinely played with the dog. Plaintiff's affidavit indicates that his torch was not working properly and went out several times, causing a loud "popping" sound every time it went out. He alleges that the popping sound aggravated the dog and caused it to attack him, knocking him down and causing severe back and hip injuries. On March 31, 1987, plaintiff filed the instant complaint pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. §§51 et seq.

STANDARD OF REVIEW

Fed R. Civ. P. 56(c) provides that summary judgment may be granted when the materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Hersh v. Allen Prods. Co., Inc., 789 F.2d 230, 232 (3d Cir.1986); Lang v. New York Life Insurance Co., 721 F.2d 18 (3d Cir. 1983). In deciding whether an issue of material fact does exist, the court is required to view all doubt in favor of the non-moving party. Meyer v. Riegel Prods. Corp., 720 F.2d 303, 307 (3d Cir. 1983), cert. denied, 465 U.S. 1091, 104 S.Ct. 2144, 79 L.Ed.2d 910 (1984); Knoll v. Springfield Township School District, 699 F.2d 137, 145 (3d Cir. 1983); Smith v. Pittsburgh Gage and Supply Co., 464 F.2d 870, 874 (3d Cir. 1972). The threshold inquiry is whether there are genuine issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. Anderson

v. Liberty Lobby, Inc. 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

DISCUSSION

> Under [FELA] the test of jury case is simply whether proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury ... It does not matter that, from the evidence, the jury may also, ... on grounds of probability, attribute the result to other causes ... Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to this single inquiry whether, with reason, [the] negligence, of the employer played any part at all in the injury...

Gallick v. Baltimore & Ohio R.R. Co., 372 U.S. 108, 117 (1963). While FELA should be liberally construed by this Court to effectuate its underlying policy of compensating railroad employees for work-related injuries, it does not provide for strict liability. Lavender v. Kurn, 372 U.S. 645 (1946); Inman v. Baltimore & Ohio R.R. Co., 361 U. S. 138 (1960). Therefore, establishing a "reasonable foreseeability of harm is an essential ingredient of FELA negligence." Gallick at 117.

Plaintiff's burden is to "adduce reasonable evidence to show a breach of duty owed by the defendant to him in respect to the place where he was injured and that in whole or in part injuries resulted proximately therefrom." Delaware, L. & W.R. Co. v. Koske, 279 U.W. 7, 11 (1929). The duty owed to plaintiff is that a reasonable or ordinary care. Id. "Events which are too remote to require reasonable precaution need not be anticipated." Brady V. Southern R.R. Co., 320 U.S. 476, 483 (1943).

Plaintiff argues that Conrail should be liable because it failed to provide him with a reasonably safe place to work. Specifically, plaintiff asserts that Conrail should have known of the dangerous character of the dog and that Conrail was negligent when i supplied him with a defective torch. The general rule applicable to this case is as follows:

> Whenever facts are disputed or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inferences. Only where thee is a complete absence of probative facts to support the conclusion reached does reversible error appear.

Lavender v. Kurn, supra. at 653.

Plaintiff presents no evidence which would support an inference that Conrail was aware of the dangerous nature of the dog. On the contrary, deposition testimony indicates that the dog was even-tempered, playful, and had never before attached anyone. Absent evidence of Conrail's awareness of the dog's dangerous nature, plaintiff cannot sustain his burden of proof on this issue.

Plaintiff does present evidence which could support an inference that Conrail supplied him with a defective torch. However, plaintiff does not present evidence, circumstantial or direct, which supports an inference that the popping noises emanating from the allegedly defective torch caused the dog to attack his leg. Nothing but speculation ties the popping noise to the dog's attack on plaintiff.

Plaintiff's belief that popping noises "attracted and aggravated the dog", as set forth in paragraph 6 of his affidavit, is not sufficient, at this late state of the case, to withstand a motion for summary judgment. Accordingly,

IT IS on this 5th day of April, 1989, ORDERED that Conrail's motion for summary judgment is granted.

/s/ John C. Lifland
United States District Judge